FILED
NOV 19 1940
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 582

WILLIAM SQUIRE NEAL,

Petitioner,

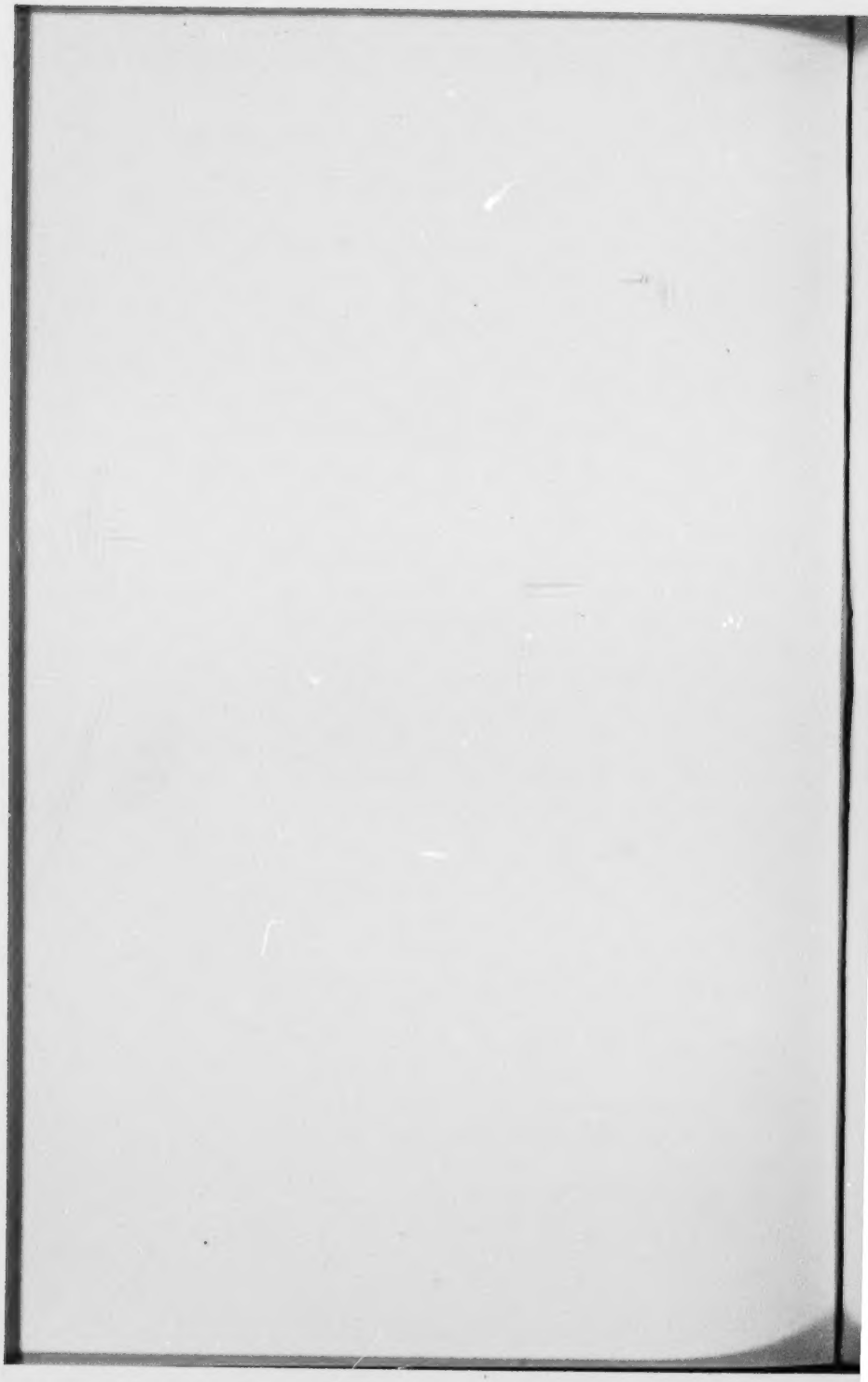
vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND MOTION TO DEFER CONSIDERATION THEREOF.

EDWARD J. CALLAHAN,
JOSEPH A. KOZLAK,
FRANK J. KOZLAK,
Minneapolis, Minn.,
Counsel for Petitioner.

WILLIAM J. HUGHES, JR.,
NICHOLAS J. CHIASCIONE,
Bowen Building,
Washington, D. C.,
GEORGE R. SMITH,
Minneapolis, Minn.
Of Counsel.



INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Opinions below	1
Jurisdiction	1
Summary statement of the matter involved	2
Questions presented	4
Argument	5
Reasons for the allowance of the writ	10
Conclusion	10
Appendix—Opinion of the United States Circuit Court of Appeals for the Eighth Circuit of April 13, 1939	11
Motion to defer consideration of the present petition	27

Table of Cases Cited.

Alice State Bank v. *Houston Pasturage Co.*, 274 U. S. 240	5
Ballew v. *United States*, 160 U. S. 187	8
Baltimore & C. Line v. *Redman*, 295 U. S. 654	6
Berry v. *United States*, 111 F. (2d) 615	3, 6
Conway v. *O'Brien*, 111 F. (2d) 611	3, 6
Cornero v. *United States*, 48 F. (2d) 69	3, 8
Duncan v. *Montgomery Ward Co.*, 108 F. (2d) 848	3, 6
Eastern Livestock Assn. v. *Dickenson*, 105 F. (2d) 116	6
Farrar v. *Wheeler*, 145 Fed. 482	8
Gardes v. *United States*, 87 Fed. 172	8
Haynes v. *United States*, 101 Fed. 817	8
Kepner v. *United States*, 195 U. S. 100	9
Leader v. *Apex Hosiery Co.*, 108 F. (2d) 71	6
Massachusetts Protective Assn. v. *Mouber*, 110 F. (2d) 203	6
Millers Mutual Fire Insurance Assn. v. *Warroad Potato Assn.*, 94 F. (2d) 741	6
Neilson, Ex parte, 131 U. S. 176	4, 9

Page

Oppenheimer v. *United States*, 242 U. S. 85 7
Palko v. *Connecticut*, 302 U. S. 319 8
Patton v. *United States*, 281 U. S. 276 7
Slocum v. *New York Life Insurance Co.*, 228 U. S. 364 ..... 3, 5
Snow, Ex parte, 120 U. S. 274 4
Thompson v. *Utah*, 170 U. S. 343 2
Trono v. *United States*, 199 U. S. 521 9
Whitworth v. *United States*, 114 Fed. 302 8

STATUTES CITED.

Act of August 24, 1937 (12 U. S. C. A., Sec. 588(b)), 50 Stat. 747, 749 2
Judicial Code, Section 240(a) 2
28 U. S. C. A. 876 ..... 5, 7, 8

OTHER AUTHORITIES CITED.

4 Bl. Com. 37 5
Rules of Civil Procedure, Rule 50 ..... 5, 6

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 582

WILLIAM SQUIRE NEAL, *Petitioner,*

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petitioner respectfully prays for the issuance of a writ of certiorari to review a judgment of the United States Circuit Court of Appeals for the Eighth Circuit.

Opinions Below.

The opinion below in the first appeal is reported at 102 F. (2d) 643, and is reprinted as an appendix to the present Petition (P. 11). The opinion below of which review is asked is unreported but found in the record at page 586.

Jurisdiction.

The judgment below was entered October 15, 1940 (R. 590). A motion for leave to file and a Petition for Rehear-

ing subsequent to the expiration of the fifteen days allowed for such petitions by Rule 18 of the Rules of the Eighth Circuit was filed November 19, 1940. Even though such petition should be denied the present petition is still timely.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended.

Summary Statement of the Matter Involved.

The petitioner was tried twice for the offense of being accessory after the fact in respect of the theft by his brother of certain money from a national bank, a crime only made an offense by the Act of August 24, 1937 (12 U. S. C. A. Sec. 588(b), 50 Stat. Chap. 747, p. 749). At the first trial he made a motion for a directed verdict on the ground that there was no evidence to show that the currency found in his possession and supposed to have been a part of the fruits or proceeds of the theft was stolen subsequent to the time this form of theft was made a crime by the statute, i.e., August 24, 1937. Such a showing was essential, indeed jurisdictional, inasmuch as lacking it the prosecution would have been *ex post facto* under *Thompson* v. *Utah*, 170 U. S. 343.

The Circuit Court of Appeals for the Eighth Circuit on the first appeal held squarely that there was no evidence showing that the money found in petitioner's possession was "part of the fruits or proceeds of the offense" of the principal, that is, that it was money stolen by the principal *after* rather than *before* August 24, 1937. (102 F. (2d) 643, 648, App. p. 18.) The court said that there was no relevant evidence to support a verdict of guilty and that the petitioner's motion for a directed verdict should have been granted. The court said this in so many words (p. 649, App. p. 21).

In spite of this when the court reversed, instead of sending back the case with instructions to the Trial Court to

dismiss the prosecution and order the petitioner discharged (as in *Cornero* v. *U. S.*, 48 F. (2d) 69, C. C. A. 9th), the court sent it back with instruction to grant a new trial. At the second trial the evidence was likewise meager, but sufficient proof was eked out to show that Sixty Dollars ($60.00) of the Five Thousand Nine Hundred Three Dollars ($5,903.00) found in petitioner's possession was only issued as currency subsequent to August 24, 1937, the vital date. This, according to the Trial Court, with certain other circumstances was sufficient evidence upon which the case could have been submitted to the jury, and the jury, having acquitted the petitioner of misprision under Count Two (which is not here involved), convicted him on Count One of being accessory after the fact. A second appeal based upon the insufficiency of the evidence, (see motion for a directed verdict, R. 449, and in arrest of judgment, R. 20) having been made and denied, the court below affirmed on the ground that there was sufficient evidence to go to the jury, the court being compelled subsequent to verdict to scrutinize it from the viewpoint most favorable to the Government (R. 586).

Present counsel were only retained November 11, 1940, and being aware of the decision of the Circuit Court of Appeals for the Eighth Circuit in *Duncan* v. *Montgomery Ward Co.*, 108 F. (2d) 848, cert. granted by this Court April 8, 1940, and now pending, and likewise of the decision of the Circuit Court of Appeals in *Conway* v. *O'Brien*, 111 F. (2d) 611, cert. granted 1940, now pending (see also *Berry* v. *U. S.*, 111 F. (2d) 615, cert. granted, now pending) and likewise having their doubts as to whether the doctrine of *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364, either still exists, or if it still exists is applicable to a criminal case, filed below a petition for rehearing raising the question of the right of the Circuit Court of Appeals on the first appeal to send back the case for a new trial instead

of for a dismissal and discharge. Or, from another aspect, counsel argued that either by reason of the doctrine of former jeopardy or *res judicata* the petitioner was entitled to and is now entitled to a dismissal, the entire question being apparent on the face of the record and constituting a form of plain error unassigned. It was pointed out to the court below that the cases holding that former jeopardy must be pleaded and cannot be raised *de novo* in an appellate Court were cases of the usual sort, wherein some question of fact might be involved, which is not the present case wherein the question is one solely of law appearing on the face of the record. Hence, it was argued that the court below could validly notice the error, if convinced that it was an error, and could grant the rehearing. Inasmuch as this Court in *Ex Parte Neilson,* 131 U. S. 176, and *Ex Parte Snow,* 120 U. S. 274, and recognized that the defense of double jeopardy was truly jurisdictional in character and could be raised by *habeas corpus,* there is obviously no reason why it should be specially asserted at the trial if it appears otherwise in the record as a pure question of law. The Government can meet the argument as well now as then.

As the petition for rehearing below was only filed November 19, 1940, the date the present petition for a writ of certiorari is being filed, we respectfully ask this Court to defer consideration of the present petition until the court below has ruled upon the case.

Questions Presented.

1. Whether the petitioner was not entitled at the second trial to the dismissal of the case and to discharge from custody on the ground that the Circuit Court of Appeals in reversing should not have sent back the case for a new trial, but should have ordered a judgment for petitioner.

Petitioner's theory is that either because of the constitutional protection against double jeopardy, the doctrine of *res judicata,* or the requirement that the Appellate Court should dispose of the case as right and justice may require (28 U. S. C. A. Sec. 876) he was entitled to a dismissal. The Appellate Court's decision was a constructive acquittal.

2. Where there is an insufficiency of evidence (not a mere error in admission or exclusion of evidence or other error of law) and a directed verdict should have been entered for defendant, is the Appellate Court under the doctrine of *Slocum* v. *New York Life Insurance Co.,* 228 U. S. 364, compelled to send the case back for a new trial, or is it not required in a criminal case to enter final judgment? We believe that the doctrine of *Slocum* v. *New York Life Insurance Co., supra,* is inapplicable to a criminal case, but if hitherto applicable we ask that the doctrine as applied to a criminal case like the present be specifically overruled.

3. As a safeguard under *Alice State Bank* v. *Houston Pasturage Co.,* 274 U. S. 240, in the event this Court grants certiorari, we feel it only fair to argue that the facts are entirely insufficient to permit the case to have gone to the jury, there being no personal aid given the felon (4 Bl. Com. 37) and the facts showing at most the receipt of stolen property.

Argument.

It may be seriously questioned whether the doctrine of *Slocum* v. *New York Life Insurance Co.,* 228 U. S. 364, is in line with current legal thought. It is significant that Rule 50 of the Rules of Civil Practise avoids the doctrine by enacting an automatic reservation of the power in the Trial Court to enter the right judgment no matter what the verdict of the jury. As a result of this the Appellate Court has power to order the Trial Court to enter the judgment

that should have been entered, whether for plaintiff or defendant.

Duncan v. *Montgomery Ward & Co.*, 108 F. (2d) 848 (C. C. A. 8th, Jan. 23, 1940, cert. granted April 8, 1940, U. S. S. Ct., undecided);

Conway v. *O'Brien*, C. C. A. 2nd, 111 F. (2d) 611, cert. granted 1940, now pending;

Berry v. *U. S.*, C. C. A. 2nd, 111 F. (2d) 615, cert. granted 1940 now pending;

Massachusetts Protective Assn. v. *Mouber*, C. C. A. 8th, 110 F. (2d) 203, 207;

Eastern Livestock Assn. v. *Dickenson*, 107 F. (2) 116, 1920;

Baltimore & C. Line v. *Redman*, 295 U. S. 654;

Leader v. *Apex Hosiery Co.*, 108 F. (2d) 71, 81;

Millers Mutual Fire Insurance Assn. v. *Warroad Potato Assn.*, C. C. A. 8th, 94 F. (2d) 741, 743.

Inasmuch as the new rules cannot change substantive rights, it would seem to follow that unless Rule 50 of the Rules of Civil Practise should be held invalid, the change is merely procedural and probably results from the abandonment of the rigid doctrine of the majority opinion in the *Slocum* case, and the adoption in its stead of what seems to us the convincing argument in the dissenting opinion of Mr. Chief Justice Hughes in that case, concurred in by Justice Holmes and several other Justices.

The dissenting opinion seems to us absolutely conclusive in a criminal case, disavowing as it does the argument in the majority opinion that a new trial should be had to give the plaintiff (here the Government) the opportunity to repair by new evidence omissions and defects of proof at the first trial. Certainly no such doctrine ought to exist in a criminal case, public policy being entirely the other way and firmly dictating that the Government should be pre-

pared when it first goes to trial, and that the defendant should not be worn out by a succession of trials collaborated in by the Appellate Court to the extent of giving helpful hints to the Government.

The further argument in the majority opinion in the *Slocum* case that a new trial was necessary because of the right of the parties to a jury trial under the Seventh Amendment is obviously inapplicable to a criminal case, where the right to a jury trial is the right of the defendant and not of the Government, and so may be waived or dispensed with in a proper case (*Patton* v. *U. S.*, 281 U. S. 276). Obviously a defendant is losing no constitutional right, as the plaintiff theoretically was losing it in the *Slocum* case, when in a criminal case the Appellate Court orders a final judgment in his favor. On the other hand, he *is* losing a substantial right when the case on reversal is sent back for a new trial, *i.e.*, his right to be protected against double jeopardy or his right to the doctrine of *res judicata* (*Oppenheimer* v. *U. S.*, 242 U. S. 85).

Lastly, as to the suggestion in the majority opinion in the *Slocum* case that apart from constitutional limitations there was no way at common law upon reversal of a case at law to do other than to award a new trial, this suggestion seems not only repudiated in the dissenting opinion but likewise repudiated by this Court in promulgating Rule 50 of the New Rules of Civil Practice. It can hardly be supposed that this Court would have interpreted the empowering statute which led to the New Rules to hold that it conferred authority to dispense with a jury trial where such a right existed. Hence, aside from the majority opinion in the *Slocum* case, this Court must have deemd the right of the Appellate Court to enter final judgment as already existing, no doubt under the appellate statute giving this Court and the Circuit Court of Appeal power on appeal to dispose of the case as law and justice might require (28 U. S. C. A.,

Sec. 876, held applicable to criminal cases in *Ballew* v. *U. S.*, 160 U. S. 187, and *Farrar* v. *Wheeler*, 145 Fed. 482; see also *Haynes* v. *U. S.*, 101 Fed. 817, 818; *Gardes* v. *U. S.*, 87 Fed. 172, and *Whitworth* v. *U. S.*, 114 Fed. 302, 305).

We feel therefore that no statute (other than 28 U. S. C. A. 876 relative to appellate power) was necessary to give the Court below power to enter judgment for the defendant when it reversed. This Court recognized the power in *Ballew* v. *U. S.*, 160 U. S. 188 and the Circuit Court of Appeals for the Ninth Circuit did the same in *Cornero* v. *U. S.*, 48 F. (2) 69. (See also cases cited at end of last paragraph.) The propriety and necessity of such a judgment seems obvious. Had the Trial Court ruled as the Appellate Court said it should have on defendant's motion for a directed verdict, the defendant would have been released on the spot. It seems, therefore, that an Appellate Court should inherently have the power to place him in the position he should have enjoyed before but for the Trial Court's error. Only in such a way can he be said to have obtained the full benefit of his appeal. Conversely, if the Appellate Court orders a new trial for the purpose of allowing the Government to piece out its deficiencies in proof by new evidence to be obtained under the guidance of the Appellate Court's opinion, it may well be questioned whether, though the Government has no power of appeal in a criminal case (*Cf. Palko v. Conn.*, 302 U. S. 319), it has not reaped the benefit of an appeal which has been predominantly in the Government's favor by allowing it to make valid at a second trial what was invalid at the first.

It is felt, therefore, that every argument of sound public policy, and indeed of fundamental concepts of fairness, points to the rule herein contended for. It is not believed that there is any jurisdictional objection. Nor is it felt that there is any merit in the technical objection that the defense of former jeopardy or *res judicata* should have been

raised at the second trial, otherwise they are waived. Where the jurisdictional error complained of (and this Court has held the error jurisdictional in *Ex Parte Neilson*, 131 U. S. 176 and the other cases already cited) appears on the face of the record, it would seem heartless to contend that the defendant cannot raise the point at this time. There is no alleged "waiver" of the constitutional defense that can be spelled out. The defendant has not waived it. He is asserting it here and in the Court below by his petition for rehearing. If upon that petition or this petition the Court can decide the point we see no argument except one of routineer technicality in claiming that he should have raised the point further back.

The distinction is emphasized once more between a case wherein as here a motion for a directed verdict should have been granted because of insufficient evidence and one wherein the error is in the admission or exclusion of evidence, the instructions of the judgment, misconduct of counsel, etc. (Cf. *Kepner* v. *U. S.*, 195 U. S. 100; *Trono* v. *U. S.*, 199 U. S. 521.) In cases of the latter character, it may be said that there is no jeopardy because no trial at all, in the legal sense, resulted. If, therefore, the defendant undertakes to have the Appellate Court so hold he trades whatever benefit he got out of the trial for the right to have the judgment set aside and a trial *de novo* awarded. In such a case the human error on the part of the court or government counsel in failing rightly to try the case must be excused on superior grounds of public policy. Where, however, the government having investigated a defendant, having presented evidence to a grand jury and secured an indictment, solemnly announces that it is ready and puts the defendant in jeopardy of life or limb before his peers, an equal public policy should dictate that the government should have but one opportunity, and where no case has been made out against the defendant he should rightly be

discharged. The Appellate Court should so order on the basis of a constructive acquittal.

Reasons for the Allowance of the Writ.

We feel the foregoing shows an important question of constitutional and criminal law which has not been but ought to be settled by this Court.

Conclusion.

It is respectfully submitted that the petition herein should be granted and the judgment below reversed with instructions to the Trial Court to dismiss the prosecution and discharge the defendant.

Respectfully submitted,

EDWARD J. CALLAHAN,
JOSEPH A. KOZLAK,
FRANK J. KOZLAK,
Minneapolis, Minnesota,
Attorneys for Petitioner.

WILLIAM J. HUGHES, JR.,
NICHOLAS J. CHIASCIONE,
Bowen Building,
Washington, D. C.,
GEORGE R. SMITH,
Minneapolis, Minn.,
Of Counsel.